

MAY 17 1982

Office of the Regional Attorney  
Chicago, Illinois

Our Ref: GC:RA:V  
RASC 82/19

Red Lake Housing Lease - MER-5-393

Donald D. Boyle  
Director, ROFEC  
Region V

This is with reference to your April 1, 1982 memorandum pertaining to the Indian Health Service lease of 39 housing units from the Red Lake Band of Chippewa Indians at Red Lake, Minnesota.

Red Lake is a Federal Indian Reservation established by the treaties of October 2, 1863 (13 Stat. 657) and April 12, 1864 (13 Stat. 639), and the Act of January 14, 1899 (25 Stat. 642). Sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C.A. 3476-477, gave Indian tribes the authority to enter into leases up to ten years upon the approval of the tribe. The Red Lake Band of Chippewa Indians voted to accept the provisions of the Indian Reorganization Act within two years after its passage. 1/

Pursuant to the Indian Self-Determination and Education Assistance Act (P.L. 93-538), the Secretary of Health, Education and Welfare entered into a contract for the construction of 39 housing units on the Red Lake Reservation for IHS hospital personnel at a cost of \$2,400,000. Pursuant to Sections 16 and 17 of the Indian Reorganization Act of 1934, supra, and the Indian Health Care Improvement Act (P.L. 94-437), the Tribe requested the Indian Health Service to enter into a lease for the units. Congress found in section 2(e) of the Act, 25 U.S.C.A. 1601(f)(4), that improvement of Indian health was imperiled by "related support factors" and cited as an example that "over seven hundred housing units are needed for staff at remote service facilities." Section 704 of P.L. 94-437, 25 U.S.C.A. 1674, provides:

Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this Act, to enter into leases with Indian tribes for periods not in excess of twenty years. 2/

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1/ This information was furnished by Patricia Simmons, Tribal Relations Specialist, Division of Tribal Government Services, Bureau of Indian Affairs, Department of Interior, Washington, D.C.

2/ Section 5(a) of Public Law 95-537 added a provision to 25 U.S.C.A. 1674 that property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with such Indian tribe.

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This section is the legal basis for entering into leases for staff housing under section 301(b)(3) of the Act, 25 U.S.C.A. §1631(b)(3).

The Indian Health Service leased the housing units from December 15, 1980 to June 15, 1981, with an option for a six-month extension upon 30 days notice prior to the end of the original lease term for "a nominal payment of \$1.00 per year." Paragraph 6F of the lease stated that the "Government shall provide all maintenance, repair and upkeep of buildings and property." A lease renewal notice to extend the lease was not issued by your office until July 29, 1981. The Tribe had presented a proposed lease to the Indian Health Service which was forwarded to your office on July 1, 1981, but was unsatisfactory. Negotiations continued until February 4, 1982 when your office reached a tentative agreement for an annual rental of \$108,545 retroactive to December 13, 1981 subject to Indian Health Service concurrence.

On February 24, 1982, the Red Lake Band of Chippewa Indians passed a resolution stating, in part:

"BE IT FURTHER RESOLVED, that the Indian Health Service pay to the Red Lake Band of Chippewa Indians all monies collected for rent from June 16, 1981 to December 13, 1981 for the time that these facilities were used without any proper authorization from the Tribe.

Your office indicated that the Indian Health Service has picked up all costs related to the property from June 16, 1981 to December 13, 1981 except for one individual responsible for checking renters in and out. However, the proposed new lease was negotiated with the provision that the Tribe will do all the maintenance and management work. We understand that the Tribe has already paid the \$13,653 insurance premium.

The initial question is whether there is any legal liability for the period June 16, 1981 through December 13, 1981, and, if so, the amount of such liability. That determination depends, in part, on what law is applicable. The question of the appropriate law to be applied was addressed in United States v. Forness, 125 F.2d 923 (2nd Cir., 1942), cert. den. City of Salamanca v. United States, 62 S. Ct. 1293, 316 U.S. 594 (1942), a case involving a suit by the United States on behalf of the Seneca Nation of Indians to enforce the Nation's cancellation of a lease for nonpayment of rent upon lands in the City of Salamanca, New York. The Court stated at 125 F.2d 932 that state law "cannot be invoked to limit the rights in lands granted by the United States to the Indians because . . . state law does not apply to the Indians except so far as the United States has given its consent." The court determined that it must

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look to the "common law" for a determination of the dispute and in so doing applied the legal rules as to landlord and tenant which comported with the Congressional intent concerning the Seneca Nation. Id. 125 F.2d at 937, 938.

In the absence of a statute to the contrary, a presumption generally arises that a holding over by a tenant effects a renewal of the lease as to the tenant on the same terms as the original lease. 51C C.J.S. Landlord and Tenant, §73 (1968). Unless otherwise provided by statute, where a tenant under a lease for a definite term holds over his term without a new agreement, the landlord may either treat him as a tenant or turn him out as a trespasser. C. Moynihan, Introduction to the Law of Real Property (1962). Here, the Tribe clearly treated the Indian Health Service as a tenant. The action of the Tribe constituted a renewal of the lease from June 16, 1981 through December 15, 1981 on the same terms as the original lease from December 15, 1980 to June 15, 1981. Thus, we conclude that the Government is liable for six months rent or fifty cents of the annual dollar rental charge.

A second question that should be considered is what extra-legal factors, if any, should be taken into account when ascertaining the amount to be paid to the Tribe for the six-month period beginning June 16, 1981. The Court in Forness at 125 F.2d 941 noted that "the dealings of certain of our citizens with the Indians have often been far from praiseworthy" and "federal courts usually, unless precluded by complete want of power, have done what they could to prevent unfairness to Indians." Of course, the Indian Health Service would want to avoid a public outcry similar to that emanating from the purchase of Manhattan Island from the Indians in 1625 for trinkets valued at \$24.

There are statutory, regulatory, and agency guidelines governing a contracting officer's responsibilities in negotiating leases. It is the contracting officer's duty to "acquire property and services . . . at the lowest reasonable cost" while "promoting fair dealing and equitable relationships among the parties in Government contracting." 41 U.S.C. §401(2), (12). When negotiating a lease, the contracting officer should acquire space "on the basis most favorable to the Government, with due consideration to maintenance and operational efficiency, and only at charges consistent with prevailing scales in the community for comparable facilities." 41 C.F.R. §101-15.100(b) (1981). The GSA Handbook, Acquisition of Leasehold Interests in Real Property (PASP 1600.1), summarizes the permissible rentals for property leased by the Government. Cf. RA VIII (Knoll) to ROFEC (Moore), Leasing and Bonding IHS Projects, 5/7/77. However, the Regulations state that even a total rental of \$1.00 per year can legally be negotiated if it can be determined that such a price is fair and reasonable. See 41 C.F.R. §101-15.104(a) (1981).

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A number of factors appear relevant in your determination of whether to pay the Tribe a sum in excess of fifty cents for the period June 15, 1981 through December 15, 1981. The Indian Health Service absorbed all costs related to the property except for an individual responsible for checking renters in and out. The lease specified that the Government was to provide all maintenance, repair, and upkeep of the buildings and property. Although the rent was increased from \$1.00 to \$108,545 per year, the increase reflects the Tribe's agreement to provide the maintenance, repair, and upkeep of the buildings and property. Moreover, the entire project was for the sole benefit of improving Indian health and not providing a windfall rental profit to the Tribe. Accordingly, we suggest that it would be fair to pay an additional rental for the June 15 - December 15, 1981 period that would cover the fair and reasonable cost of the individual responsible for checking renters in and out.

If you have any questions or we can be of any additional assistance, please contact us.

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